NO. 71-1033

In The Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

GREAT DANE TRAILERS, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Trial Examiner's Decision	1
Board Decision and Order	44
Board Order Amending Decision and Order	47
Order Denying Rehearing by the Fourth Circuit Court of Appeals	49

(Caption Omitted In Printing)

TRIAL EXAMINER'S DECISION

Statement of the Case

PAUL E. WEIL, Trial Examiner: On December 18, 1969, Truck Drivers and Helpers Local Union No. 728, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the charging Party, filed a charge against the Great Dane Trailers, Inc., hereinafter called Respondent, alleging violations of Section 8(a)(3) and (1) by discrimination against certain named employees. The Charging Party thereafter amended its charge on February 17, 1970. On February 26, 1970, the Regional Director for Region 17 (Atlanta, Georgia), issued a complaint based on the charge alleging that Respondent had violated Section 8(a)(3) and (1) of the Act by discharging five employees, and a reprimand given to one of them prior to his discharge. The General Counsel also alleged that Respondent independently violated Section 8(a) (1) by the action of a department head who allegedly threatened employees with loss of insurance and hospitalization benefits if the Union won a Board election then scheduled. By its duly filed answer Respondent admitted the jurisdictional facts and certain other matters, admitted issuing the reprimand but denied the discharges and the conclusions which the General Counsel would draw therefrom, as well as denying the commission of any unfair labor practices.

On the issues thus joined a hearing was held at Savannah, Georgia, before me on April 14, 15, and 16, 1970. All parties were represented by counsel, had an opportunity to be heard, to examine and crossexamine witnsses and to introduce relevant and material evidence. At the close of the hearing all parties waived oral argument. Briefs have been received from all parties. Upon the entire record herein and in consideration of the briefs, I make the following:

FINDINGS OF FACT

I. Jurisdiction

It is alleged and admitted that Respondent is a Georgia corporation which manufactures and sells freight hauling trailers at its Savannah, Georgia plant. Respondent annually sells and ships its products valued in excess of $50,000 directly to customers located outside the State of Georgia and is accordingly engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Background

Commencing in the summer of 1969, District Lodge No. 96, International Association of Machinists and Aerospace Workers, AFL-CIO, and the Charging Party both engaged in organizing campaigns among Respondent's employees. The campaigns culminated in the filing of a petition by the IAM in which the Charging Party intervened. The parties stipulated for a consent election on December 1, 1969, and an election was conducted on December 19, 1969. No majority of the votes were cast for any of the three choices on the ballots whereupon a runoff election by secret ballot was conducted on January 9, 1970, with the choices narrowed to "no union" and the Charging Party, the intervenor therein. The runoff election resulted in a tie with 346 votes cast for and 346 votes against representation by the intervenor with 7 challenged ballots. In the Regional Director's report on challenged ballots the Acting Regional Director found that two employees were ineligible to vote in the election and the remaining five individuals who cast challenged

ballots were discharged employees, the same five who appeared in the instant proceeding as alleged discriminatees. They are Ester Hodge, Melvin Pinckney, Dan J. Vangiller, Frank Allen and Herman Leachman.

General Counsel contends that each of the five employees named above was discharged because of his union adherence and in order to restrain and coerce the employees of Respondent. Respondent on the other hand contends that each of the five was discharged for cause. The discharges all took place in the year 1969, the earliest being that of Hodge on October 24, 1969, and the last that of Leachman on December 18, 1969. There is no apparent interconnection among the five discharges; the additional discrimination alleged with regard to employee Allen's reprimand on November 25 which preceded this discharge on December 8 will be considered below in the discussion of this discharge.

ESTER HODGE

Ester Hodge was hired on September 2, 1969, as a B assemblyman in the subassembly of flooring of trailers. His supervisor was Vincent Meeks. His specific work was to drill holes in the material being affixed to the flooring of the trailers on an assembly line. On the day of his discharge a leaderman in his department, Wendell Bragg, brought him a drill motor and told him not to leave it laying around because employees on the other shift would pick it up and they would lose it. It appears that there was at this time a shortage of the power tools supplied by the Employer due to the fact that a number of them were broken down. Hodge testified that he went to his supervisor, Meeks, and asked his permission to keep the drill motor in his toolbox where his personal tools were kept. Meeks asked Hodge where he got the drill. Hodge told him he got it from Bragg who had said that he got it off the line. Meeks gave Hodge

his permission to put the drill in his toolbox. Later the same day another employee, Boone, came to Hodge and told him that the drill motor he was using was Boone's. Hodge answered that was not Boone's drill motor, that he got it from Bragg who told him that he had got it off the line.[1] Boone then went to Meeks and complained whereupon Meeks called Hodge over to his desk. At his desk Meeks asked Hodge where he got the drill and Hodge told him that he got it from Bragg. Meeks called Bragg to his desk and asked him whether he gave Hodge the motor. Bragg answered that he had done so and Meeks asked Bragg what he had told Hodge about where he had got the motor. Bragg answered that he had got it off the rail. Meeks then accused Hodge of having told him that Bragg had to get it off the line and Hodge said that that was what Bragg told him. Bragg then admitted that he might have told Hodge that he got it off the line but he meant that he got it off the rail. Meeks then took Hodge into his office and accused him of lying and told him that this could cost him his job. Hodge denied telling a lie, stating that he said only what Bragg told him and reminding Meeks that Bragg had admitted that he might have told him that. Then according to Hodge, Meeks accused him of pushing the Union which Hodge denied, whereupon Meeks said that he could call seven guys into the office right at that time that had been solicited by Hodge. Hodge answered "You haven't seen me try to get anybody to sign any cards while I'm on the job and what I do on my own time . . . it's not any of your business." Meeks then told Hodge and Bragg to go back to work. Five or 10 minutes later Meeks called Hodge and discharged him for.

[1]The term "off the line" apparently means from a part of the production line other than the department in which the employees here concerned were working. That part of the production line in which they were working was referred to by them as "on the rail."

lying. Hodge argued with him that he had not lied to him but Meeks answered only that he should take it up with the personnel office.

Hodge was an active union supporter and wore a union button on the job. He testified credibly that he actively solicited fellow employees on his lunch hour and after he got off from work.

Supervisor V. J. Meeks testified that on the morning in question Hodge asked his permission to use a drill which he had borrowed off the line. He testified that he inquired whether Hodge had the permission of the supervisor in the other department to borrow the tool and Hodge said that he did wherefore Meeks gave him permission to use the tool. Thereafter Meeks saw Boone approach Hodge and an argument ensued. He went over to find out what the argument was about and Boone accused Hodge of taking his drill motor. According to Meeks he took the drill motor out of Hodge's rear pocket and checked the number on it and found that it was a drill motor that he knew had been assigned to Boone. He then took Hodge and Boone to his office where he again asked Hodge where he had gotten the motor and Hodge again claimed that he had gotten it off the line. He then told Hodge that he was dissatisfied with him as an employee and discharged him for lying and for the other matters with which he was dissatisfied. Asked if Bragg had taken part in the conversation Meeks at first testified that Bragg said that he had seen Hodge pick up the tool and then that Bragg might have stated that he gave the tool to Hodge.

Ronnie Lee Bell, Sr., an employee called by the General Counsel, testified that he saw Bragg pick up the drill motor from Boone and later give it to Hodge. He saw Boone arguing with Hodge and taking the drill motor from his pocket. Boone handed the drill motor to Meeks who examined it.

Boone, called by Respondent, testified that Bragg borrowed the motor from him. He later went to Bragg to get it back and Bragg said that Hodge had it. He went to Hodge and asked for his motor. Hodge denied having his motor. Boone picked the motor out of Hodge's hip pocket and Hodge said that he had gotten it off the assembly line. Meeks came up and Boone gave him the motor and Meeks examined it.

Eddie Lee Holmes, another employee called by the General Counsel, testified only that he saw Bragg give Hodge the motor. He did not hear any of the conversation.

Discussion and Conclusion

Respondent contends that Hodge's testimony should not be credited and points out that Hodge admitted that some 10 years prior to his discharge he had been convicted of a bad check charge. While it is true that the conviction, which is freely admitted by Hodge, impairs his credibility to some extent; I note that the incident is remote in time; the effect as far as I am concerned is that it should cause me to view his testimony with more than ordinary care. As far as his receiving the machine from Bragg is concerned there is ample corroboration for his testimony and I so find. I find also that Bragg informed Meeks prior to the discharge that he had given the machine to Hodge and I credit the testimony of Hodge that Bragg informed Meeks that he might have told Hodge that he had gotten the machine off the line rather than on the rail. In view of the testimony of Boone and Bell, to the extent that they corroborate Hodge, it is difficult for me to see how Meeks could seriously have reached a conclusion that Hodge was lying to him; if anyone lied it would appear to have been Bragg and if anyone were in fault in the matter it would appear to have been Bragg. Hodge at no time did anything more than repeat the claim of Bragg that Bragg had gotten the machine from

another department. I do not credit Meek's testimony. He was self-contradictory both with regard to what Bragg had told him and with regard to his story that he took the drill motor out of Hodge's pocket. All the other evidence reveals that Hodge had already returned it to Boone when Meeks approached him. Meeks admitted that the other complaints he had about Hodge, which consisted of spending too much time in the men's room, working too slowly, and failing to wear safety glasses, were of such a nature that he had even given Hodge a reprimand. Accordingly I find that the alleged reason for the discharge of Hodge is completely pretextual. I have found above that Hodge was seriously engaged in organizing activities and that he wore a union button on the job which must have come to the attention of Meeks although he testified that he did not recall seeing Hodge wear such a button. Admittedly Respondent is anxious to keep a union out of its plant. Respondent publishes a handbook which is required reading for all new employees. The handbook has a 1-1/2 page statement on labor unions which starts out in capitals "THIS IS A NON UNION COMPANY" and states "we . . . will use every means at our command to keep another union out of our plant." Hodge's discharge took place during the height of the Unions' organizing campaigns. In the absence of a valid reason for the discharge I am forced to infer that the real reason, the only reason that I can infer from the evidence, for Hodge's discharge is his union activity. Accordingly I find that Hodge was discharged because of his activities on behalf of the Charging Party and in order to discourage employees in the exercise of their rights protected under the Act.

MELVIN PINCKNEY

Melvin Pinckney had been a truckdriver before he was employed by Respondent and had been a member of a local of the Teamsters Union in New Jersey. He was employed

on October 13, 1969, as a truckdriver. His duties consisted of intraplant movement of trailers from department to department. He worked under the supervision of Malcolm Williams who apparently caused him to be hired on the recommendation of Isaac Goodman, another driver who had been employed on the same task for the past 25 years.

For the first week of his employment Pinckney rode with Goodman to become familiar with the layout of the plant, how to find the trailers, and where to take them. The second week of his employment he worked as the sole driver on the evening shift from 4 p.m. until midnight daily. It does not appear that anything unusual took place. At the end of his second week of employment he was told to report the following Monday morning at 7 a.m. to work on the day shift.[2]

Pinckney's instructions with regard to the movement of trailers, where to find them, which trailers to move, and where to take them were given him by the watchman or gateman by a two-way radio. Any department head or supervisor who wanted a truck removed or brought to his department would call the watchman who would apportion the work among the three drivers at his disposal. During the 4th week of Pinckney's employment the radio became defective.[3]

Also during the 4th week of his employment Pinckney found that a trailer that he had been instructed to move had

[2]It appears that the four drivers were rotated on a monthly basis so that one driver always worked on the evening shift while the other three worked days.

[3]Pinckney did not so testify. He testified that he was informed by Williams that he was not to use the radio and he was to drive back and forth to the watchman's shed to get his instructions; he did not, however, contradict the testimony of Williams that these instructions resulted from a breakdown of the radio equipment.

a flat tire. He contacted Goodman who told him to move the trailer out carefully so that he did not bump it against an adjacent trailer and to take it to a certain place where the the flat tire would be repaired. Pinckney moved the trailer out and testified that he was careful that it did not bump into an adjacent trailer. At a later time Goodman reported to Williams that the adjacent trailer had been damaged and attributed the damage to Pinckney. Williams sought out Pinckney and admonished him for damaging the trailer and advised him that anytime in the future he damaged a trailer he was immediately to inform Williams so that appropriate repairs could be made. He also warned him to be careful not to damage trailers because repairing them was expensive. Pinckney denied having damaged the trailer but apparently Williams did not accept his denial.

At the end of the 4th week of Pinckney's employment his radio was still out of commission. He testified that he had been seeking a trailer unsuccessfully and returned to the watchman s shed to report to him that he could not find the trailer he was supposed to move. He told the watchman that he proposed to drive to the department to which he was supposed to remove the trailer and explain to the supervisor there why he had not delivered the trailer. The watchman approved this action. As he left the watchman's shed Pinckney saw another driver. They both stopped and a conversation ensued concerning the trailer which Pinckney was accused of damaging. They also talked about the other driver's automobile and problems he was having with it and the fact that he was going to take it somewhere to have work done on it. According to Pinckney this conversation could have taken no more than a few minutes.

Williams testified that during the 3rd and 4th weeks of Pinckney's employment Williams had been getting an increasingly large number of complaints that Pinckney was not moving trailers fast enough and that he was having

trouble finding them. On the morning of the last day of Pinckney's 4th week Williams received such a complaint and sought out Pinckney. He called the watchman and was told that Pinckney had been seen talking to another driver around the corner from the watchman's shed. He proceeded there and watched Pinckney and the other driver talk for a few minutes and then broke up the conversation, advising Pinckney that he had work to do and that the watchman was waiting for his return. Williams testified that he went back to his office and during the course of that day thought over the complaints he had been having about Pinckney and determined that in view of the damage to the trailer and the fact that Pinckney's work did not seem to be improving he would discharge him. This he did at 4 that afternoon.

Discussion and Conclusion

General Counsel contends that Pinckney was discharged by Williams because of his union activities. It is clear that after the second week of his employment Pinckney wore a union button at all times. He also testified that he engaged in other union activities, that he spent his lunch hours eating with various employees, talking to them about the Union, and that he aided the union organization in other ways. Williams admitted that the complaints that he got about Pinckney commenced at about the same time as Pinckney's wearing of the union badge. He also admitted that he himself had taken part in the antiunion campaign and had passed out handbills on a number of occasions. He testified that he had done everything in his power to defeat the Union but denied that the Union had anything to do with the discharge of Pinckney.

I credit Williams's denial. The inference is clear from the testimony of Pinckney that he was not a wholly satisfactory employee, although he testified that on numerous occasions he had been complimented on his work. When ask-

ed to specify the occasions he could think of only two. One was at the end of the first week when Williams had asked him how he was doing. He answered that he felt that he was learning the job well and Williams answered that he hoped so. The second occasion amounted to no more than a leadman saying, more or less admiringly, to Pinckney that he certainly moved a certain trailer fast. James Cavanah, a vice president and Williams' direct supervisor, testified that he received a number of complaints that Pinckney was not moving trailers rapidly enough. He testified that he took no action as a result of this, leaving it to Williams and he did not direct Williams to reprimand Pinckney in any way. Pinckney admitted in his testimony that he had trouble on occasion finding the trailers and that he had been criticized by Williams for spending too much time looking for them. Williams on this occasion advised him that if he could not find the trailer promptly to let Williams know and Williams would help him. With regard to the conversation that culminated in Pinckney's discharge Pinckney testified that he could not have taken more than a few minutes although he was not watching his watch. However, from the testimony he gave with regard to the content of the conversation, it appears quite likely that it took more than a few minutes.

I am not convinced that the discharge of Pinckney was in any way related to his union adherence or activities. Pinckney's testimony, substantially corroborating that of Supervisor Williams, was that he had difficulty in finding and moving trailers promptly and when he was unable to find a trailer had a tendency to spend more time than was warranted looking for them rather than seeking assistance from his superior, Williams. It is not seriously contended that he was not responsible for the damage to the trailer occasioned by his moving an adjacent trailer with a flat tire. However, in my opinion this merely adds weight to the Employer's rationale for the discharge, it obviously was

not enough in itself to cause it. It does not appear from the record that the attitude of Respondent toward its employees' nonworking activities during the working day was particularly permissive although the Charging Party contends to the contrary. Its contention is based upon the testimony of Pinckney that he was told, while he was on the night force, by a fellow employee that it was permissible for him to sleep while on duty as long as he kept his radio on so he could be reached. Nor do I find any great persuasiveness in the fact recited by the Charging Party in its brief that Supervisor Williams could not state with certainty on cross-examination the number of trailer movements accomplished by Pinckney as compared with the number of trailer movements accomplished by the other two day-force drivers during the same period of time. Williams testified that Pinckney was slow in this regard and that he had the precise information in a book at the plant but he can scarcely be charged with not having brought the book to the hearing; nobody subpoenaed it and it was not until his cross-examination that its existence came to light. Neither the General Counsel nor the Charging Party suggested that he bring the book in or that any further steps be made to accomplish such a comparison. I found nothing inherently incredible in Williams' testimony that Pinckney was not as fast as the other employees with whom the Charging Party would have us compare him. On the other hand I would find it remarkable if he were as fast since both of them had more practice in moving trailers than Pinckney, one of them, Goodman, having been engaged for 25 years in this endeavor. While the case is not without suspicion I cannot say that the evidence preponderates in favor of a finding that the discharge of Pinckney was in any way engendered by his union activities. Accordingly I shall recommend that the complaint be dismissed insofar as it alleges that the discharge of Pinckney violated Section 8(a)(3) and (1) of the Act.

DANIEL J. VANGILLER

Daniel J. Vangiller had been employed by Respondent since August 1968. At the time of his discharge in November 1969 he was an A assemblyman working under the supervision of O. F. Young and David English.

On November 7 Vangiller asked permission of David English to take off at 1:30 in the afternoon to go to an adoption agency with his wife with regard to the adoption of a child. When permission was granted English told Vangiller, according to Vangiller's testimony, that he would have to work the following Saturday. Vangiller came in Saturday morning and found only about seven men working. He asked English whw there were so few employees and English said that nobody had to work that Saturday except those that wanted to, whereupon Vangiller asked permission to leave so that he could pay some bills and get other personal matters straightened out. English refused to let him leave, stating in essence that he was scheduled to work and was needed on the job and required him to stay. The following Monday Vangiller asked English and Young both if he could have the following Saturday off and they both said that they would make the necessary arrangements and work something out. Vangiller reminded English and Young that he wanted to be off the following Saturday throughout the following week. On Friday he went to Young and asked if it was still worked out so that he could be off the following day and Young said that it was not worked out and that he would have to work. Vangiller reminded Young that he and English had both promised him the day off to which Young answered that if he did not come in on Santuray he need not return other than to pick up his paycheck.

An hour or two later Vangiller went back to Young and told him that he was giving him a week's notice, that he was quitting. Young's response was to wait while he talked to

English. He went into English's office, talked to him and came back and told Vangiller that English required that he be at work on the following day, Saturday.

In the middle of the afternoon Vangiller apparently changed his mind, and told Young that he wanted to withdraw his notice. Young said he would have to talk to English and English said he would have to talk to the personnel office but refused him permission to go to the personnel office on company time. After 3:30 in the afternoon when he had finished his day's work Vangiller went to the personnel office where he spoke first to the receptionist. He asked to see the personnel manager, she checked with Thor Egede-Nissen, the personnel manager, returned to Vangiller and said that Egede-Nissen would see him in a few minutes. He waited approximately an hour after which he was escorted into the presence of Egede-Nissen. He told the personnel manager the problem both as to working the following day and withdrawing his notice to quit. Egede-Nissen told him to go ahead and work out his notice, quit, and then reapply for his job and stated, according to Vangiller, that if they were to accept his withdrawal the Union might have a complaint if they came in. Egede-Nissen then asked Vangiller how he felt about the Union. Vangiller said it did not matter either way with him because if he no longer had a job it could not help or hurt him. Egede-Nissen also stated that he understood Vangiller had been participating in union activities, which Vangiller acknowledged to be the fact. Egede-Nissen told him that after he worked out his notice he should come back and see Egede-Nissen's assistant, Price.

Vangiller failed to work the following day, Saturday, returned Monday and worked through Thursday. Nothing was said to him during the course of the week about his failure to work Saturday or about his notice other than conversations with English and Young, who wanted to know

what he had learned in the personnel office. These took place on Monday. The following Friday, which would have been the day his notice expired, Vangiller came to the department entering through a gate through which he was normally not permitted to enter. He spoke to several of the men he worked with and then went into the office to English. English asked him how he got in and told him he was not suppose to come through the service department. English instructed Young to go with Vangiller to get his tools and check him out of the Company's employ. As Young took him to the toolroom to return the Company's tools, Young asked him whether he thought the Union was coming in, to which Vangiller answered in the affirmative. Young responded that he did not think the Union would come in and that they were going to do everything they could to keep it out and he again asked Vangiller if he really supported the Union. Vangiller answered that he did, he supported it on the inside and that when he went out he would ride it to the end, one way or the other, whichever way it went.

The following Monday Vangiller returned to the plant and asked for Price. He was told that Price was not in and would not be in that day. The next day Vangiller called the personnel office and asked if Price was in; he was and Vangiller was told to come and see him. Vangiller went to the personnel office and filled out an application which he handed to the receptionist. She took the application to Price's desk. Price sent her to get some records at which he looked, and then the receptionist came back and told Vangiller that Price said he could not help him due to his record. Vangiller never spoke personally to Price. Vangiller has made no further attempts to gain reemployment at Respondent's plant.

David English, the department head, testified that the rule in his department was that overtime and especially

Saturday work is either mandatory or optional. Generally speaking the employees were notified at the end of the shift on Thursday whether it would be one or the other. In the event that the situation changes so that it is not necessary for all the employees to work on a Saturday, those who have signed up to work are permitted to work even if they have to be farmed out to another department, since the Employer did schedule them to work. On the other hand, once a man had volunteered to come into work the Employer scheduled him to work and required his presence just as though it were any other scheduled worktime. Accordingly, on the day in question, because Vangiller left at noon on Friday, and Saturday work was made optional thereafter, Vangiller remained scheduled to work on Saturday and Respondent scheduled work for him to do. Thus on Saturday when Vangiller came in, Saturday work was not optional as to him but was mandatory. English denied that he had any conversation during the following week with Vangiller with reference to Vangiller getting off on the following Saturday. According to his testimony, the next event occurring in connection with Vangiller was on the Monday preceding Vangiller's cessation of employment, when English was told by Supervisor Young that Vangiller had given him notice that he was going to quit the following Friday. He approached Vangiller later Monday morning and asked him if it was true that he had told Young that he was going to quit. Vangiller answered in the affirmative whereupon English said "well, it is up to you" and broke off the discussion. English testified that Vangiller never spoke to him about withdrawing his notice of resignation nor did he have any conversation with Vangiller on the following Friday when Vangiller came in to check out. He testified that Vangiller was scheduled to work that Friday morning. English testified that when Vangiller served notice that he was going to quit the following Friday he immediately ordered another man who started the following Monday after

Vangiller had quit.

Mrs. Simpson, the clerical employee in the personnel office, testified that she had no recollection of Vangiller ever coming into the personnel office to see Egede-Nissen. The only time she recalled Vangiller coming to the personnel office was to pick up a check. She testified with regard to the incident that she pulled Vangiller's old personnel file and gave it to Mr. Price but recalled nothing else happening. She did not explain why she pulled the personnel file and gave it to Mr. Price if Vangiller's errand concerned picking up a check.

Personnel Manager Egede-Nissen testified that he did not recall ever talking to Vangiller in the office but stated that he had two recollections in connection with Vangiller. One, at some time, Vangiller telephoned to see him about getting his job back. Egede-Nissen told Vangiller to come in and see him at a specified time but does not recall him doing so. The other was that one of the girls came into his office and said Vangiller was waiting and he could not see him. He has no other recollection of the occurrence. Egede-Nissen also testified that at the time of Vangiller's termination he had an assistant, Everett Price, and he himself was very busy. Accordingly employees seeking to talk to him would generally have been referred to Price.

Everett Price was never called to the witness stand. The record reveals that he is now employed in Savannah in connection with the police department. The record does not reveal whether the personnel folder for Vangiller contains an application filled out as he testified.

O. F. Young, the intermediate supervisor between English and Vangiller, testified that Vangiller informed him the Monday before his termination that he was giving him a week s notice. He asked Vangiller why and Vangiller said he was working too much overtime and he had to have some time for personal business. That was all that was said.

On Thursday Vangiller came to Young and asked if there was any way he could withdraw his resignation. Young told him there was nothing he could do about it, that he would have to go back to personnel but declined to let him go to personnel until after the close of business. The following day, Friday, Vangiller came in at 10 a.m. in street clothes to check out. While Young was checking him out, according to Young, a conversation was held during the course of which Vangiller told Young that one of the reasons he was quitting was because of the union election coming up. He wanted to get out while he could because he had trouble before while he was working at Great Dane when they had a strike but that he might come back later after the Union was "settled out." According to Young's recollection Vangiller had had some trouble with employees when he crossed a picket line in 1963 and got into afight. Young testified that he was "sort of puzzled" that an employee who was wearing a IAM union badge would quit before the election because of his fear that the Union would come in but he said nothing about it to Vangiller.

Other than this comment from Vangiller, Young testified he never had any conversation with Vangiller concerning the Union and he specifically denied making the remarks attributed to him or questioning Vangiller.

Both English and Young denied that they have fired employees for failing to work overtime in the past or that they have reprimanded any employee in the recent past for failure to work overtime.

Discussion

I was not satisfied with the testimony of Assistant Superintendent English. I am convinced that he testified with less than candor in various respects. His denial that he was unaware that the Employer had a "no union policy" or was antiunion is incredible in view of the fact that this com-

pany policy is written up at length in the employee handbook and the handbills distributed by supervision on behalf of the Company clearly disclosed the Company's policy in this regard. English was identified not only by other employees but by Supervisor Tuten as one of the supervisors who passed out the company handbills. It is clear and English admits that he knew exactly which employees among those who worked under him wore union buttons and which of them wore Teamsters buttons as opposed to IAM buttons.

The Charging Party contends that in effect Vangiller was discharged by the action of the Employer in refusing to permit him to withdraw his resignation. He is alleged to have been discharged by the General Counsel but there is no question that he in fact resigned. I do not credit the testimony of either English or Young that there had been no incident on the Saturdays preceding his resignation. Both English and Young admitted that the reason he gave for resigning was that he needed time off to accomplish some personal business. This is consistent with Vangiller's testimony that he had not been able to get time off on the preceding Saturdays for this purpose and is inconsistent with what is at least the inference that must be drawn from the testimony of Young and English that if he had wanted to refrain from working on Saturday he would only have to say so. Egede-Nissen testified that when an employee quits and attempts to come back to work he is normally interviewed to determine why he had quit and then the personnel manager confers with his ex-supervisor to determine whether he is to be rehired. However, Egede-Nissen distinguished between the situation where an employee quit and where he walked off the job and Respondent contends that Vangiller falls into the latter category because he was to have worked on Friday and did not do so. Vangiller was asked by the General Counsel why he did not work on the last Friday and he testified "I got to thinking,

what's one more day you don't have a job after today no how, so what difference does that one day going to make (sic)."

The General Counsel offers no controversion of Egede-Nissen's testimony that Respondent made a distinction which appears to me to be valid between a quit and an employee who simply walks off the job. It is equally valid in my opinion to place Vangiller in the latter category in the light of his testimony that he in fact had resigned effective at the close of business on Friday but failed to work the last day as he admitted. Under these circumstances I cannot find that Respondent's refusal to consider him thereafter on the following Tuesday, when he made application to Price for employment, was violative of the Act in any regard. This leaves only the question whether Respondent's refusal to permit him to rescind his resignation amounted to a discharge. I believe the testimony of English and Egede-Nissen that upon being apprised of Vangiller's resignation English promptly reported it to Egede-Nissen and asked for a replacement. It would appear to follow therefore that the matter had been taken out of English's hands and that Vangiller would have to go to the personnel office to rescind his resignation if possible. I credit Vangiller's testimony, to the extent that he testified that he went to Egede-Nissen's office and asked to rescind his resignation and I credit his recollection that Egede-Nissen said that he would not permit Vangiller to rescind his resignation but suggested to him that he come back the following week and reapply because of the situation then extant between two unions competing for the vote of the employees.

I do not credit Vangiller's testimony with regard to additional remarks he attributed to Egede-Nissen with regard to Vangiller's union activities. They do not follow from the rest of the discussion in Egede-Nissen's office and I believe

that it would be probable that Egede-Nissen, under the circumstances of the union campaign then going on and Respondent's avowed nonunion position, would have been careful about questioning an employee such as Vangiller, particularly one whose iminent departure from Respondent's employ renders his answers somewhat less valuable than they would otherwise have been. I note that Egede-Nissen did not specifically deny that there had been a conversation but testified that his recollection was very hazy. However he did not specifically deny discussing with Vangiller his efforts on behalf of the Union. I credit his denial in that regard. I note that Vangiller's testimony was at some points at variance with that contained in his affidavit given very shortly after his layoff. This does not in my opinion enhance his credibility nor convince me that I should credit him in the face of what I deem to be the credible denial of Egede-Nissen.

The question remains whether the refusal by Egede-Nissen to consider a withdrawal of the resignation was discriminatory. I believe that it was. Respondent offers no evidence on which I can find that it had an inviolable rule, or a rule at all, that a resignation could not be withdrawn but had to be effectuated. The only evidence with regard to that is that of Vangiller, which I have credited, that Egede-Nissen declined to permit it on the ground that one of the Unions might predicate objections on whatever action he took. Since it is clear that Respondent was aware of Vangiller's adherence to the IAM[4] it would seem to follow that Respondent in effect was refusing to permit the recision of the resignation because of his union activities. Accordingly I infer and I find that the refusal violated Section 8(a) (3) of the Act since it would not have taken place but for the

[4]Apparently it was only after Vangiller had terminated his employment that he espoused the cause of the Charging Party herein.

union activity in the plant and Vangiller's activities with regard thereto.

FRANK ALLEN

Frank Allen was hired in January 1969 as a riveter in department 58 under the supervision of Acey Burnett and H. O. Beasley. About 2 weeks later he was transferred to another job sealing and undercoating trailers and a month later he was again promoted to A assembly, each of which promotions resulted in a pay raise.

In September 1969 Allen became interested in the Teamsters organizing and joined the union, commenced wearing a pin bearing the legend "Vote Union," and talking to other employees in an effort to organize the plant during his lunch hours and breaks. The first day he wore his button, he credibly testified; Supervisor Beasley came to him and asked him where he got the pin and what it meant. He also asked whether Allen was aware that Great Dane was a nonunion plant. Beasley asked when they were going to have an election and asked Allen if he thought it was right to wear the pin in a nonunion plant. This took place during the morning. After lunch on the same day Supervisor Burnett sent Allen to the office to see Beasley. Beasley informed Allen that he was giving him a reprimand for not sealing a trailer correctly.[5] Allen testified that the trailer that he was accused of sealing incorrectly was not resealed but went out to a customer. He also testified that there was no difference in the job he did sealing that trailer from the job he had done on any other trailer during the 11 months he had been employed.

Allen testified that on the Tuesday before Thanksgiving he was late to work because he had visited his wife in the

[5]Sealing a trailer consists of applying a plastic substance on the joints where the back and sides of the trailer meet to make it waterproof.

hospital before coming in to the plant. The following Tuesday he was again late, this time 15 minutes. He was again sent to Beasley who told him he was going to give him a reprimand because he was late 3 days in 1 week. Allen signed the reprimand and Beasley put it in his desk drawer and said that if Allen was ever late again he would turn it in. The rule at Respondent's plant is that two reprimands within a period of 6 months warrant a dismissal. On the morning of December 8 Allen was 5 minutes late to work. He had driven to South Carolina over the weekend and his car had broken down whereupon he took a bus to get to work and was late. He reported to Beasley who told him that he would have to turn in the reprimand and gave him no opportunity to explain the reason for his tardiness.

Allen testified that before he started wearing a union pin he had been late on several occasions and had never been reprimanded and that he knew of other employees who were habitually late to work but had not received reprimands or been discharged. H. O. Beasley, the head of the department, testified that about half of the employees in his department, numbering some 50 to 60, wore union buttons and he testified that he never spoke to any employee about the union buttons although a couple of employees may have mentioned them to him. He testified that he was aware that Allen commenced wearing a button sometime in September and wore one frequently thereafter.

Beasley testified that in October his attention was called to two trailers that had been improperly sealed by Allen. The problem was brought to his attention by Burnett, the direct supervisor, and by the inspector, Berry. He testified that the job was deficient in that the sealer hung in "big wads" under the top rail of the trailer. He called Allen into the office and reprimanded him verbally and caused Super-

visor Burnett to fill out a reprimand slip, which was received in evidence. The slip was dated October 7, 1969, and was signed by Allen. It states "Not following instruction (sic) sealing a trailer wrong after being instruted (sic) of the proper way." Burnett and Berry both testified about the incident. All three of these witnesses testified that there were two trailers improperly sealed by Allen and that one of them was resealed in the department while the other was not.[6] Other than the fact that the testimony indicates that there were two trailers involved whereas Allen testified with regard to only one and his testimony is corroborated by the warning slip, there is no real issue with regard to this occurrence other than whether reprimands were occasioned by Allen's union activity rather than by his poor work. Allen does not deny that the inspector refused to pass the trailer after he had sealed it.

All the witnesses agree that Allen commenced wearing the union button in September. Allen testified that the reprimand was given him on the day he commenced wearing the union button, and also on that day he had a conversation with Beasley in which Beasley commented on his wearing the button, asking what he thought it would gain him and if he thought it was proper to wear it at the plant because the Company was nonunion. The record of the reprimand however places the date of the reprimand well after the date on which Allen commenced wearing the union button. The argument thus loses a great deal of its force that the reprimand was given by Beasley because of Allen's union adherence. The Charging Party argues that the imposition of this reprimand should be found an unfair labor practice because of the known antiunion bias of the Employer and the timing of the incident. But the timing

[6]Berry testified that the other trailer was taken to the paint department, which is out of his jurisdiction, where it was resealed.

of the incident does not appear to be related to anything. I do not find that the imposition of the first reprimand was violative of the Act. There is no question that at the time the reprimand was given half of the employees in the department were wearing union buttons and there is nothing in this record from which I can determine that Allen was any more or less involved in the Union's campaign than the remainder of the button-wearing employees.

Beasley testified that Allen had a poor attendance record and that on November 25 when he (Allen) showed up late for the third time in a week he filled out a reprimand form and told Allen that he would put it in his desk drawer rather than turn it in. He warned Allen that if he did not cure his propensity for tardiness and absenteeism that he would turn in the reprimand. This would automatically result in Allen's discharge since it appears to be an inviolable rule of the Company that two reprimands within a 6-month period result in the termination of the reprimanded employee. Nevertheless, thereafter Allen failed to show up for work on Monday, December 8, and the next morning came in late. It is customary at Respondent's plant for employees who come in late to be given their timecard by the watchman to take to the supervisor. The supervisor then approves the timecard and has an opportunity to admonish the employee. When Allen took his timecard to Beasley, on the morning of the 9th, Beasley reminded him that he had been warned on November 25 that if he were late again the reprimand would be turned in and advised Allen that he was terminated. Allen left the plant promptly.

Allen's testimony was quite different. He testified that the morning of December 8 he came in 5 minutes late because his car broke down and he had to catch a bus to go to work. Asked when his car broke down, he answered:

> That was the weekend. I went home to South Carolina, my car breaks down on me and I leave it. I came back

to Savannah Monday morning and I caught the bus to work and I got there about 5 minutes after 8.

In support of Beasley's testimony Respondent produced its attendance record for Frank Allen which, according to the testimony of Miss Simpson, the personnel clerk, was improperly marked by a temporary employee who was working in the office the month of December. The attendance record has a legend showing the symbols to be used for various markings. They are as follows:

A. Excused Absences
I. Unexcused Absences
L. Layoff
T. Tardy
S. Sickleave
V. Vacation

Miss Simpson testified that she did not use this marking code but used another one which was in general use by Respondent. The code she used as she explained was S for sick, U for unexcused, T for tardy, V for vacation, E for excused. The card which is in evidence contains for the year 1969, 22 "T's", nine "U's", four "E's" and for August 22, the number 4, for October 5, the number 2. These latter figures are not explained anywhere on the record. For December 8 there is an A and there is no marking whatsoever for December 9. Mrs. Simpson testified that she discovered during the investigation of this matter by the General Counsel that the card had been improperly marked. She took it up with Mr. Egede-Nissen who consulted with counsel and determined that the card should not be corrected. The latter is further complicated by two additional factors. According to the legend on the card, the letter A means excused whereas the testimony indicates that December 8 was unexcused. The other complicating factor is to be found in the testimony of Egede-Nissen who stated that temporary help was used only in the months of May

and June, not in December. A final complication with regard to the attendance record is to be found in the fact that both Simpson and Egede-Nissen testified that on discovering the improperly marked card they checked back to the original records and found that the absence was unexcused.

The most I can find with regard to the attendance record is that it does not serve to corroborate the testimony of either Beasley or Allen. I cannot rely on the explanation of Simpson that the card was erroneously marked by a temporary employee in view of the testimony of Egede-Nissen that there were no temporary employees employed at that time. If her testimony is unreliable in that regard, I am not inclined to rely on her further testimony that a search of the "original" record revealed that there was an unexcused absence on that day; Respondent made no attempts to produce the original record which Simpson testified was still in existence and which might have corroborated her testimony in this regard. The result is that as between Allen's testimony and Beasley's testimony, the only corroboration I have is that of Burnett. The Charging Party contends that I should discredit Beasley, particularly because he testified on direct examination that he did not pass out literature for the "go team" whereas the testimony of Supervisor Tuten revealed that Beasley passed out handbills prepared by the Employer. The Charging Party however is mistaken in this regard because the "go team," it is clear on the record consisted of a group of employees organized to combat the Teamsters organization. The handbills passed out by the "go team" were distinct from the handbills prepared by the Respondent and passed out by its supervisors. Accordingly, a denial by Beasley that he passed out "go team" handbills cannot be read to be a denial by Beasley that he passed out handbills for the Employer and it appears from his testimony that he was making that distinction.

I do not find it necessary to determine the issue of wheth-

er Allen was absent on the 8th and tardy on the 9th. He testified that he was tardy on the 8th and admittedly he had been warned on the 25th of November that if he were tardy again the reprimand would be filed and he would be terminated. Further I cannot find that the giving of this reprimand for tardiness was occasioned by his union activities. Again as I pointed out above, he was only one of half of the employees in his section who wore a union badge and there is nothing to distinguish him from the rest as far as his union advocacy is concerned. Further it would appear that there was ample justification for the reprimand on November 25 and Beasley appears to have been leaning over backward in giving Allen one more chance before sending the reprimand in. Unquestionably, Allen's record, particularly with regard to tardiness, was very bad. Whether it was the worst in the department, as Beasley and Burnett testified, is not corroborated but I would hesitate to find that the second reprimand was not occasioned by his tardiness in the face of his poor attendance record.

While the issue is not without doubt, I am not convinced that the General Counsel has presented a preponderance of the evidence sufficient to find the discharge of Allen to be violative under the terms of the Act. Accordingly, I shall recommend that the complaint be dismissed with regard to this discharge.

HERMAN LEACHMAN

Herman Leachman went to work for Respondent in the Paint shop cleaning sides of trailers on August 5, 1969. He had previously been employed in 1965 before he went into the service. His immediate supervisor was Bernard Teller and his department head was C. V. Tuten. Leachman worked on the evening shift from 4 to 12:30. On December 17, 1969, as the employees entered the plant, a distri-

bution of handbills was made either by the "go team" (discussed above) or the Employer in the form of a Christmas list of things that the Employer had done for the employees without benefit of union organization. One of the items on the Christmas list was some statement relative to overtime being optional with the employees and not compulsory. At about 10:30 in the evening Leachman addressed himself to Teller and asked him if a man didn't want to work overtime if he'd be fired. Teller answered he would not. At about that time Teller had announced that the shift would work two hours overtime that night. Shortly before 12:30, the normal quitting time, according to Leachman's testimony, he again addressed himself to Teller asking which clock he would punch out if he got off earlier than the rest of the crew. Teller asked where he was going. Leachman answered that he had no transportation home and it was raining at the time; if he couldn't get a ride home he'd have to walk. Teller answered that if he took off he would give him a reprimand and Leachman answered that in that case he would have to accept it because he had no other way home, to which Teller answered, "no that's okay, go ahead, I'll take it up with Charlie (Tuten) in the morning." The next day when Leachman arrived his card had been pulled. He went to Tuten's office, which was the normal course when an employee's card is not in the rack, and Tuten discharged him for walking off the job.

Teller's story is somewhat different. He stated that several times during the night after he had informed the men that they would be working overtime, Leachman called out asking if he didn't work overtime he would be fired. Teller's response was that he had the overtime posted on the board and gave the employees enough notice that they would be working overtime. Apparently, according to his testimony he never did say that Leachman would or would not be fired if he walked off the job. Immediately before

12:30, Leachman came to Teller and asked him what clock to punch. Teller answered that if he was leaving he was walking off the job; that the employees were scheduled to work until 2:30. Leachman left, and as he was leaving Teller told him that they, apparently referring to Department Head Tuten, would make a decision with regard to him the next day. He testified that he said nothing about giving him a reprimand and he denied that Leachman made any mention of having to get a ride or having a ride problem. The only remark he made was that he worked 8 hours and did not have to work overtime. Teller testified that he had never personally discharged an employee or recommended discharge for failure to work scheduled overtime, nor did he know of any employee discharged by anyone for failure to work scheduled overtime. The testimony of both Leachman and Teller agrees with the testimony of various other witnesses that another employee, Williams,[7] who asked Teller at 12:30 to get off because he didn't have a ride, was given permission to get off and in fact left at 12:30 and was not reprimanded or discharged. Teller testified that he normally gave employees permission to leave early if they had any good reason. In fact, he testified that he let Leachman off not long before this occurrence when he wanted to take off early to see his wife in the hospital.

Charles V. Tuten testified that on the morning of December 18 when he came into the office he found a memorandum from Teller about the occurrence. He called for Leachman's records from the personnel department.

In checking Leachman's personnel records he found that he had terminated Leachman for having left the job early on a previous employment and accordingly he had no alternative but to go ahead and let him go again. He testified that only he terminates employees in his department

[7]Williams was also a union adherent, and a member of the union organizing committee.

and he even requires that reprimands be evaluated by himself before they are issued.

The record left by Teller to Tuten is in evidence. In pertinent part it states:

> Charley Leachman went home at 12:30 after I told him at 10 o'clock we were working over. He said he worked 8 hours and didn't want to work any overtime, I talked to Pete and Pete said to let him know he is leaving on his own that we would see about it tomorrow. As you know Leachman is leaving us the last week of this month.

Discussion

Respondent contends that the discharge was consummated solely because Leachman walked off the job without the permission of his supervisor and that the supervisor would have given him permission if Leachman had given him as the reason for getting off early that he needed a ride home. Thus the sole factual issue is whether, in the conversation between Leachman and Teller, Leachman said why he wanted to go home. The General Counsel produced a number of corroborating witnesses and testified that they had gotten permission to leave and had failed to work overtime on various occasions without being discharged or otherwise reprimanded. One testified that he had received several reprimands for failing to work overtime. The only organizing activity engaged in by Leachman, other than wearing two union buttons, appears to have been that he handbilled at the plant on four or five occasions prior to his discharge. There is no evidence that there was any communication between Teller and Tuten other than the memorandum quoted above. It was Tuten that determined what, if any, disciplinary act should be taken. This determination, he credibly testified, he based in part on the fact that he had in the past terminated Leachman for walking off the job

and felt that the instant situation raised a disciplinary problem that could be met only with a discharge. There is no indication in Teller's memorandum that Leachman gave any reason for wanting to be off early other than he did not want to work overtime. This would seem to be consistent with the reaction that Leachman obviously had to the handbill he had received the same evening stating that overtime was not compulsory. I find it difficult to believe that in an informal memorandum of this nature Teller would have given less than the full facts to his department head, Tuten. I note also that all of the employees called by the General Counsel in support of Leachman's story, Tommy Chester, Melvin Washington, Jr., Nathaniel Jones, Dyrel Thomas, and Thomas Bentley, were members of the Union's organizing committee. The only employee called by the General Counsel on this issue who was not a member of the Union's organizing committee was Ronnie Butler and his testimony was as follows: "All I know is that it was that night he (Leachman) couldn't work over for some reason and he didn't and the next day all I know he was fired or discharged." Thus the only employee and indeed the only witness to the incident who appears to be disinterested is Butler and he fails to corroborate Leachman except to the extent that he testified that Williams had taken off without working the overtime and had not been discharged and that he himself on another occasion under another supervisor had been permitted to leave early because he needed a ride. I am not convinced that Leachman told Teller the reason he wanted to go home, I believe rather that he acted in reliance on the statements made in the handbill that overtime was not compulsory. It is clear that Teller refused to give him permission to leave and told him in effect that he would be considered to have walked off the job if he left. All the evidence, both with regard to Leachman and with regard to other employees, reveals that walking off the job is a

cardinal sin at Respondent's plant. Here under the circumstances that the records disclosed that he had walked off the job the last time he had been employed and had been terminated for that reason plus the fact that Teller told Tuten that he was leaving the Respondent's employ within 2 weeks convinces me that Tuten discharged Leachman for walking off the job rather than because of his union activities. Accordingly I shall recommend that the complaint be dismissed insofar as it alleges discriminaton in the discharge of Herman Leachman.

The Independent 8(a) (1) Allegations

The General Counsel alleged that Respondent violated 8(a)(1) by interrogating employees on five separate occasions concerning their union membership and activities, by action of Bernard Teller threatening employees with discharge if they supported the Union and by the action of Department Head Tuten threatening employees with loss of insurance and hospitalization benefits if the Union were successful.

First with regard to the interrogation alleged, the first incident alleged by the General Counsel is to be found in the testimony of employee Frank Allen who testified that when he first wore his button Department Manager Beasley came to him and asked him where he got the button, he told him he got it from a friend and Beasley asked him if he did not know the Company was nonunion and did he think it was right to wear a union button in a nonunion plant. Beasley denied any conversation with any employee at any time in which he said anything about the union button. Beasley also denied that he knew that the Company had a nonunion policy. I credit neither denial and I find that the questions asked by Beasley of Allen concerning his union button went beyond a mere desultory inquiry, such as would be protected under 8(c), but had as their object at least a reminder to Allen that management con-

sidered the wearing of union buttons improper in view of Respondent's status as a nonunion company. I find that the questions constitute interference, restraint, and coercion of employees within the meaning of Section 8(a)(1) of the Act.

The second alleged incident of interrogation concerns Department Head Tuten. Tuten testified that he observed union buttons being worn by employees in his department and decided that this was an indication of unrest in his department. He "made a personal evaluation trying to find out whereby he (I) might be slipping in his (my) supervision." In making this evaluation he talked to several employees asking them "where am I slipping if there is a need of trying to seek a union in the plant." He denied saying anything about the insurance program or telling anyone to take off the union buttons or asking what the Union meant or represented. Tuten also testified that he asked only a few of his employees his questions and that this included some nonunion employees. General Counsel produced evidence of several employees, all members of the Union's organizing committee, concerning interrogation by Tuten. TOMMY LEE CHESTER testified that he was called into Tuten's office where he was alone with Tuten and Tuten asked what he had done and if it was on his account that the employees were wearing union buttons; he wanted to know if they were protesting something. NATHANIEL JONES testified that one day Tuten called Jones into his office and asked him why he was wearing a button. Jones answered because he wanted to wear it. Tuten said he hoped Jones knew what he was doing and suggested that he pull it off. Jones told him he knew what he was doing and refused to take the button off. DYREL THOMAS testified that Tuten called him into the office and asked why he was wearing a button and what it represented. He answered that the guys in the department felt that they needed

a union whereupon Tuten told him that with all the opportunities the employees had they did not need a union and it was foolish for them to even think of it. Tuten then mentioned the fact that a union had been in the plant before and caused trouble and predicted that as soon as it got in there would be a strike. MELVIN WASHINGTON, Jr., testified that he had talked with Tuten a number of times about the Union, what the Union could do and could not do, and on one particular day Tuten said if the Union came in it could not promise what it says it could promise and specifically that it could not promise and deliver paid insurance and other benefits which the employees were not then getting.[8] I believe and I find that Tuten interrogated a number of employees as to their reasons for wearing union buttons. There is no evidence that any of the safeguards enumerated in *Struksnes Construction Co.*, 165 NLRB 1062, were present.[9] Accordingly I find that the interrogations constituted violation of Section 8(a)(1) of the Act. I do not find that the conversation with Washington, which obviously was part of a "bull session" in which a number of employees were participating, and which contained no threats but merely arguments of Respondent that the Union in the past caused a strike and violence and loss of jobs and that a union *per se* did not give the employees anything, was coercive. The statements attributed to Tuten were little more than statements of Respondent's position protected under the Act. To the extent that they are alleged as violations of Section 8(a)(1) *as threats*. I shall recommend the allegations be dismissed.

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[8]At that time there was a hospitalization insurance plan for employees for which the employees paid; Washington testified that he paid $3.14 a week for the insurance program.

[9]*Trailmobile Division. Pullman Inc.*, 168 NLRB No. 31.

NATHANIEL JONES testified that a week or two after his conversation with Tuten, Supervisor Teller saw him with a button and asked him why he was wearing the button. He answered that he was wearing it because he wanted to. Teller then said that the Teamsters had tried to get in there before and failed and said that he hoped Jones knew what he was doing and warned Jones not to let the button cause him to lose his job. Asked whether Teller had explained what he meant by the last statement Jones answered "he said the Teamsters had tried to get in there before and they lost and it cost some other fellows their job." Teller testified that he never discussed the Union with any employee and no employee ever tried to discuss the Union with him.

I credit Jones' testimony. I find that like the interrogations conducted by Jones' superior, Tuten, questioning the employee as to his reasons for wearing a button, violates Section 8(a)(1) of the Act. With regard to the alleged threat, while it might well be that what Teller meant was that Jones could lose his job as a result of the Union taking strike action if it got in and Jones being replaced, this is not what he said. He merely indicated that union adherence could cost Jones his job. This I find violative of Section 8(a)(1) of the Act; it is as direct a threat as there could be.

The next alleged interrogation is to be found in the testimony of Vangiller who alleged that he was interrogated by Director of Industrial Relations Egede-Nissen on November 14. I have previously found that Egede-Nissen did not make the statement attributed to him, accordingly I shall recommend that this allegation be dismissed.

Finally it is alleged that Supervisor Young interrogated employee Vangiller as he checked him out after his discharge. Young asked whether Vangiller thought the Union was coming in and indicated his opinion that he did not think the Union would. Young stated "we are going to do

everything we can to keep it out" and asked Vangiller if he really felt that way. I was not impressed with his credibility on the witness stand. However I do not find the statements violative under the circumstances herein, I do not think the statements were designed to get information concerning Vangiller's attitude toward the Union and they were certainly not designed to interfere with the rights of any employee, inasmuch as they were made at the time of Vangiller's discharge as he was literally on his way out. I recommend that the complaint be dismissed with regard to this allegation.[10] I have already discussed the alleged threat by Teller and found it violative of the Act. Finally General Counsel contends that Tuten by his conversation concerning loss of insurance benefits threatened employees; this conversation is set forth above. I do not find that violative as I stated in the discussion therein and I recommend that the complaint be dismissed insofar as that issue is alleged.

IV. The Effect of the Unfair Labor Practices on Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a) (1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It was

[10] *Rogers Bros. Co.* 169 NLRB No. 123.

found that Respondent discharged Ester Hodge and Dan Vangiller in violation of Section 8(a)(3) and (1) of the Act. Accordingly it is recommended that Respondent offer to those employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to seniority or other rights and privileges and that they be made whole for any resulting loss of pay from the date of their discharge to the date on which they are offered reinstatement plus their net earnings during that period. Backpay shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at 6 percent per annum as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating and threatening employees with loss of their employment, Respondent has interfered with, restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. By discharging Ester Hodge and Dan Vangiller, Respondent has discriminated in regard to hire or tenure of employees for the purpose of encouraging or discouraging membership in the Union in violation of Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER[11]

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, it is recommended that Respondent Great Dane Trailers, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, support of, or activities on behalf of Truck Drivers and Helpers Local Union No. 728, United Brotherhood of Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discharging employees or otherwise discriminating against them in regard to their tenure, terms or conditions of employment because of their union or other protected concerted activity.

(b) Interrogating employees in a coercive manner concerning their union activities or sympathies or threatening them with loss of employment if they continue to engage in such protected activities.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmitive action which it is found will effectuate the policies of the Act.

(a) Offer to Ester F. Hodge and Dan J. Vangiller immediate and full reinstatement to their former jobs or, if

---

[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole in the manner set forth in the section of this Decision entitled "The Remedy" for the discrimination against them.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Decision.

(c) Notify the above-named persons if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Post at its plant in Savannah, Georgia, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted.

[12] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[13]

I FURTHER RECOMMEND that the complaint be dismissed insofar as it alleges violations not found above to have been committed.

Dated at Washington, D.C.

[13]In the event that the Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 10, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. The Act gives all employees these rights:

To engage in self-organization

To form, join or help unions

To bargain collectively through representatives of their own choosing.

To act together for collective bargaining or other mutual aid or protection

To refrain from any and all of these things

WE WILL NOT do anything that restrains or coerces employees with respect to these rights.

WE WILL NOT interrogate employees coercively with regard to their union activities nor threaten them with loss of their jobs if the Union gets into the plant.

WE WILL NOT discourage membership in Truck Drivers and Helpers Local 728, IBTCWHA, or any other labor organization by discharging employees because of their union activities,

WE WILL offer Ester Hodge and Dan Vangiller immediate and full reinstatement to their former jobs or if these jobs no longer exist to substantially equivalent jobs and we will make them whole for any pay they lost as a result of our discrimination against them.

WE WILL notify the above-named persons if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

GREAT DANE TRAILERS, INC.
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Bldg., Room 701, 730 Peachtree Street, N.E., Atlanta, Georgia 30308, Telephone (404) 526-5760.

186 NLRB No. 43

D-4442
Savannah, Georgia

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GREAT DANE TRAILERS, INC.

and

Case 10–CA–8095,

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On July 1, 1970, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that such allegations of the complaint be dismissed. Thereafter, the Respondent, the General Counsel, and the Charging Party, filed exceptions to the Trial Examiner's Decision, and supporting briefs, and the Respondent also filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions,[1] and recommendations of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Great Dane Trailers, Inc., Savannah, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

[1] In the absence of exceptions, we adopt *pro forma* the Trial Examiner's recommended dismissal of a Section 8(a)(1) allegation to the effect that Respondent's supervisor Young unlawfully interrogated employee Daniel Vangiller.

[2] In sustaining the Trial Examiner dismissal of the 8(a)(3) allegation based upon the discharge of Pinckney, we place no reliance upon the Trial Examiner's statement that "It is not seriously contended that he (Pinckney) was not responsible for the damage to the trailer occasioned by his moving an adjacent trailer with a flat tire." Assuming this incident was the subject of a dispute, the record amply supports Respondent's justification for accusing Pinckney of damaging the trailer. In any event, the record supports the Trial Examiner's further finding that Pinckney's misconduct in other respects was sufficient to establish that the discharge was based upon his generally poor work performance, rather than his support of the Union.

1. In the absence of exceptions, we adopt *pro forma* the Trial Examiner's recommended dismissal of a Section 8(a)(1) allegation to the effect that Respondent's supervisor Young unlawfully interrogated employee Daniel Vangiller.

2. In sustaining the Trial Examiner dismissal of the 8(a)(3) allegation based upon the discharge of Pinckney, we place no reliance upon the Trial Examiner's statement that "It is not seriously contended that he (Pinckney) was not responsible for the damage to the trailer occasioned by his moving an adjacent trailer with a flat tire." Assuming this incident was the subject of a dispute, the record amply supports Respondent's justification for accusing Pinckney of damaging the trailer. In any event, the record supports the Trial Examiner's further finding that Pinckney's misconduct in other respects was sufficient to establish that the discharge was based upon his generally poor work performance, rather than his support of the Union.

D-4442

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations not specifically found.

Dated, Washington, D.C. Oct. 31, 1970

Edward B. Miller, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

Savannah, Georgia

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

GREAT DANE TRAILERS, INC.

and

Case 10-CA-8095

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ORDER AMENDING DECISION AND ORDER

On October 31, 1970, the National Labor Relations Board issued a Decision and Order [1] in the above-entitled proceeding and, on November 19, 1970, a correction thereto, adopting, with modifications and corrections, the findings, conclusions, and recommendations of the Trial Examiner. By that Decision, the Board found, *inter alia*, that Respondent violated Section 8(a)(3) of the National Labor Relations Act, as amended, by discharging employee Ester Hodge because of his union activities, and ordered his reinstatement with backpay.

Acting on its own motion, the Board has reexamined the original Decision and Order, as corrected, as well as the entire record and having duly considered the matter,

IT IS HEREBY ORDERED that the said Decision and Order, as corrected, be, and it hereby is, amended by adding the following paragraph to footnote 3 of the Board's decision:

1 186 NLRB No. 43.

In its brief to the Board, the Respondent refers to certain evidence as precluding the reinstatement of Ester Hodge, with backpay. As we are not satisfied that this issue was fully and fairly litigated at the hearing, further consideration of Respondent's contention in this regard will be left to the compliance stage of this proceeding.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as previously corrected and as hereby amended.

Dated, Washington, D. C., December 18, 1970.

By direction of the Board:

George A. Leet

Associate Executive Secretary

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15,269

GREAT DANE TRAILERS, INC.

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

—ORDER—

The petition for rehearing, together with the suggestion for rehearing en banc having been read and considered and no judge in active service having requested a poll of the Court on the suggestion for rehearing en banc, it is, with the concurrence of Judge Sobeloff and Judge Russell,

ORDERED, that said petition be, and it is hereby, denied.

For the Court:

/s/ Harrison L. Winter

United States Circuit Judge.

FILED
Nov. 19, 1971
Samuel W. Phillips
Clerk

In its brief to the Board, the Respondent refers to certain evidence as precluding the reinstatement of Ester Hodge, with backpay. As we are not satisfied that this issue was fully and fairly litigated at the hearing, further consideration of Respondent's contention in this regard will be left to the compliance stage of this proceeding.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as previously corrected and as hereby amended.

Dated, Washington, D. C., December 18, 1970.

By direction of the Board:

George A. Leet

Associate Executive Secretary

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15,269

GREAT DANE TRAILERS, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

—ORDER—

The petition for rehearing, together with the suggestion for rehearing en banc having been read and considered and no judge in active service having requested a poll of the Court on the suggestion for rehearing en banc, it is, with the concurrence of Judge Sobeloff and Judge Russell,

O R D E R E D, that said petition be, and it is hereby, denied.

For the Court:

/s/ Harrison L. Winter

United States Circuit Judge

FILED
Nov. 19, 1971
Samuel W. Phillips
Clerk

NO. 71-1033

In The Supreme Court of the United States.
October Term, 1971

Supreme Court, U.S.
FILED
FEB 2, 1972
E. ROBERT SEAVER, CLERK

GREAT DANE TRAILERS, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

O. R. T. BOWDEN
Attorney for Petitioner
1056 Hendricks Avenue
Jacksonville, Florida 32207

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	11

AUTHORITIES CITED

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Boyle's Famous Corned Beef Co. v. N.L.R.B.,
400 F.2d 154 (8th Cir. 1968) 7

Consolidated Edison Company v. N.L.R.B.,
305 U.S. 197, 83 L.Ed. 126 (1938) 8

Engineers & Fabricators, Inc. v. N.L.R.B.,
376 F.2d 482 (5th Cir. 1967) 6

Federal Communications Commission v. Station WJR,
377 U.S. 265, 93 L.Ed. 1353 (1949) 8

Federal Power Commission v. United Gas Pipe Line Company,
393 U.S. 71, 21 L.Ed. 55 (1968) 10

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282 U.S. 194, 75 L.Ed. 291 (1931) 10

Hannah v. Larche,
363 U.S. 420, 4 L.Ed.2d 1307 (1960) 9

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227 U.S. 88, 57 L.Ed. 431 (1913) 8

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298 U.S. 468, 480, 80 L.Ed. 1288
1294 (1936) 9

Morgan v. United States,
304 U.S. 1, 82 L.Ed. 1129 (1938) 7

N.L.R.B. v. Dennison Mfg. Co.,
419 F.2d 1080 (1st Cir. 1969) 6

N.L.R.B. v. Fulton Bag and Cotton Mills,
175 F.2d 675 (5th Cir. 1949) 6

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298 F.2d 594 (1st. Cir. 1962) 6

N.L.R.B. v. Johnson,
322 F.2d 216 (6th Cir. 1963) 5, 6

N.L.R.B. v. MacKay Radio & Telegraph Co.,
304 U.S. 333, 82 L.Ed. 1381 8
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355 F.2d 854 (2nd Cir. 1966) 6
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339 F.2d 396 (6th Cir. 1964) 7
N.L.R.B. v. Virginia Electric & Power Company,
314 U.S. 469, 86 L.Ed. 348 (1941) 10
Phelps Dodge Corp. v. N.L.R.B.,
313 U.S. 177, 85 L.Ed. 1271 (1941) 10
Republic Aviation Corp. v. N.L.R.B.,
324 U.S. 793, 798, 89 L.Ed. 1372 (1945) 9
Russell-Newman Mfg. Co., Inc. v. N.L.R.B.,
370 F.2d 980 (5th Cir. 1966) 7
Securities and Exchange Commission v. Chenery Corp.,
332 U.S. 194, 91 L.Ed. 1995 (1947) 10
Shields v. Utah Idaho Central Railroad Company,
305 U.S. 177, 83 L.Ed. 111 (1938) 9
S. S. Kresge Co. v. N.L.R.B.,
416 F.2d 1225 (6th Cir. 1969) 7
Texas Industries, Inc. v. N.L.R.B.,
336 F.2d 128 (5th Cir. 1964) 7
Yang Sung v. McGrath,
339 U.S. 33, 94 L.Ed. 616 (1950) 8
United States v. Chicago, Milwaukee, St. Paul & Pacific RR Co.,
294 U.S. 499, 79 L.Ed. 1023 (1935) 10
Vitarelli v. Seaton,
359 U.S. 535, 3 L.Ed.2d 1012 (1959) 10

Statutes

National Labor Relations Act
§ 8(a)(1)
§ 8(a)(3)
Administrative Procedure Act

In The Supreme Court of the United States

October Term, 1971

No.

GREAT DANE TRAILERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Great Dane Trailers, Inc., through its undersigned counsel, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit Court, entered in this cause on September 9, 1971, rehearing denied on November 19, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra* p. 2a) is reported at — F.2d —, 78 LRRM 2384. The Decision and Order of the National Labor Relations Board (J.A. 51-53)[1] is reported at 186 NLRB No. 43.

JURISDICTION

The Decision of the Court of Appeals was rendered on September 9, 1971 and a Petition for Rehearing was denied

[1] References to the Joint Appendix, filed with the Court of Appeals, will be through use of the symbol "J.A.", followed by the appropriate page number.

on November 19, 1971. On September 21, 1971, prior to receipt of the Petition for Rehearing, the Court of Appeals entered a Decree enforcing the Order of the National Labor Relations Board (App. A, *infra* p. 1a). The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, consistent with the requirements of due process, there may be an administrative adjudication of property rights on the basis of findings which vary materially from the allegations of the complaint, or other instrument by which such administrative adjudication was initiated, where there has been no subsequent amendment of such complaint and no finding by the agency that the dissimilar matters in question were ever actually litigated.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision is the Fifth Amendment to the Constitution of the United States. Applicable statutes are the National Labor Relations Act, as amended, (29 U.S.C. § 151, *et seq*) and the Administrative Procedure Act (5 U.S.C. § 551, *et seq*), relevant portions of which are set forth in Appendix B, *infra*, p. 3a.

STATEMENT OF THE CASE

Following an investigation of unfair labor practice charges filed by the union[2], the Board's Regional Director for the Tenth Region issued a Complaint against Great Dane Trailers, Inc., ("Company") in which it was alleged, *inter alia*, that the Company had discriminatorily discharged five employees, in violation of Section 8(a)(3) of the

[2] Truck Drivers and Helpers Local Union No. 728. ("Union")

National Labor Relations Act. (J.A. 3-4). The Company's Answer, while admitting certain allegations, denied the discharge allegations in their entirety (J.A. 6).

With the issues thus joined, a hearing was held before a Board Trial Examiner. Thereafter the Trial Examiner issued an Intermediate Report, in which he concluded, *inter alia*, that two employees, Vangiller and Hodge, had been discriminated against in violation of Section 8(a)(3) of the Act (J.A. 28-29; 14). With respect to Vangiller, while the complaint alleged he had been discharged, the Company denied that such was the case and contended, both in the course of the hearing and in post hearing briefs to the Trial Examiner and the Board, that Vangiller had voluntarily quit his job. At the hearing it sought to demonstrate this through testimony from Vangiller's immediate supervisor (J.A. 148), his department head (J.A. 138), the Director of Industrial Relations (J.A. 203-204) as well as through cross examination of Vangiller himself (J.A. 166-167). Consistent with the Company's contentions in this regard, the Trial Examiner concluded "there is no question that he in fact resigned." (J.A. 26). Nonetheless it was concluded that Vangiller had been discriminated against on a different theory, not alleged in the Complaint, that the Company had wrongfully refused "to consider a withdrawal of the resignation." (J.A. 28). The Complaint was never amended to allege this as an act of discrimination and the theory was first advanced in post hearing briefs to the Trial Examiner.

In the case of the other employee (Hodge), the Company sought to show that he had been discharged for cause. It also introduced evidence to show that, in the course of preparation for this hearing, it came to the Company's attention that Hodge had concealed a long criminal record

when he applied for employment. On the basis of this, the Company argued that, in keeping with Board precedent in similar situations, the usual remedy of reinstatement with back pay should be withheld, even if discrimination were found. The Trial Examiner simply concluded that Hodge had been discriminatorily discharged and recommended the usual reinstatement remedy, without comment on the alternative contention that it should be withheld in any event (J.A. 13-14).

The National Labor Relations Board subsequently issued its Decision and Order in this matter, in which it adopted the previously described findings and conclusions of the Trial Examiner.

The Company then petitioned the United States Court of Appeals for the Fourth Circuit to review and set aside the Decision and Order of the Board. After the Petition for Review was filed, the Board, by motion filed in the Fourth Circuit proceedings, indicated it was reconsidering a portion of its Decision and requested an opportunity to retain jurisdiction of the cause, in the event it should decide to modify its Decision and Order. The Court of Appeals granted this request and the Board later issued an "Order Amending Decision and Order", in which the contention, regarding Hodge's entitlement to reinstatement, was mentioned for the first time by either the Board or Trial Examiner. While acknowledging that the point had been raised, the Board nonetheless declined to pass upon it for the stated reason that it did not feel the issue was "fully and fairly litigated at the hearing."[2]

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[2] Neither the Board's General Counsel nor the union ever contended this issue had not been fully or fairly litigated.

At no point has the Board mentioned the variance between the allegation that Vangiller was discharged and the theory upon which the Trial Examiner, with Board acquiesence, ultimately found discrimination. Specifically there was no attempt to justify the variance, either on the theory that the alternative ground had been fully and fairly litigated (the approach taken in the Hodge case) or otherwise.

The Court of Appeals denied the Petition for Review and granted the Board's Cross Application for Enforcement of its Order. (App. A, *infra*, p. 1a). The Company's Petition for Rehearing, addressed solely to the due process issue raised herein, was subsequently denied.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's holding is in conflict with the decision of the Sixth Circuit Court of Appeals in *N.L.R.B.* v. *Johnson*, 322 F.2d 216 (6th Cir. 1963), cert. denied 376 U.S. 951, 11 L.Ed.2d 971 (1964) on the important question of whether the Board may find a violation on some theory other than that which is advanced by its own Complaint against what it deems to be an offending party. In a broader sense the issue concerns the role of the complaint, or other means by which administrative action is initiated, as establishing a standard of relevance for the hearing required by the National Labor Relations Act or any other enactment, whether it be a hearing to be conducted in accordance with the provisions of the Administrative Procedure Act, or in instances where administrative adjudication is not controlled by the Procedure Act, but where the fundamental requirements of due process, such as adequate notice and opportunity to be heard, must be fulfilled.

The factual situation in the *Johnson* case is, in all material respects, comparable to that in question here. In that case, the Board's complaint alleged, as an act of unlawful discrimination, the failure to reinstate certain striking employees. This, according to the Sixth Circuit, presented a clear theory of allegedly unlawful conduct. Yet the Board, in what might be termed the converse of the situation presented here, made a finding that the employees in question had been discriminatorily discharged. The Sixth Circuit concluded that the Board's complaint "tends to point away from contemplation of any theory of discriminatory discharge" and the Board was therefore not justified in making a finding on that theory. The Sixth Circuit reasoned that:

> "[T]here is no reference to discriminatory discharge concerning the failure to reinstate or as a violation in itself. Discriminatory discharge is a violation of Section 8(a)(3) and failure to reinstate on request following a discriminatory discharge is yet another violation . . . (322 F.2d at p. 219).

The reasoning applies with equal force here. An allegation of discharge points away from any theory of discriminatory refusal to permit withdrawal of a resignation, no less than it points away from a theory of refusal to rehire or reinstate.

Similar views as to the office of the Complaint have been expressed in other circuits. *N.L.R.B.* v. *Dennison Mfg. Co.*, 419 F.2d 1080 (1st Cir. 1969); *N.L.R.B.* v. *H. E. Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962); *N.L.R.B.* v. *Majestic Weaving Co.*, 355 F.2d 854 (2nd Cir. 1966); *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, 376 F.2d 482 (5th Cir. 1967); *N.L.R.B.* v. *Fulton Bag and Cotton Mills,*

175 F.2d 675 (5th Cir. 1949); *Texas Industries, Inc.* v. *N.L.R.B.*, 336 F.2d 128 (5th Cir. 1964), *Boyle's Famous Corned Beef Co.* v. *N.L.R.B.*, 400 F.2d 154 (8th Cir. 1968). See also *S. S. Kresge Co.* v. *N.L.R.B.*, 416 F.2d 1225 (6th Cir. 1969), which reiterates the rule, explicated in the *Johnson* case, that "an essential element of due process (is) that an interested party must be given notice and an opportunity to prepare a defense *prior to* an adjudicative proceeding." (emphasis supplied).

2. The holding of the Fourth Circuit is in conflict with Section 554 of the Administrative Procedure Act and the decisions of other Circuits construing that Section of the Act. Section 554 requires that parties to an administrative proceeding be given "prompt notice of issues controverted in fact or law." This has been construed to mean that there must be a full and fair hearing, "conducted in accordance with fundamental principles of fair play" and unless there is fair notice of the claims of the opposing party and an opportunity to meet those claims, the requirements of due process have not been met. *Russell-Newman Mfg. Co., Inc.* v. *N.L.R.B.*, 370 F.2d 980 (5th Cir. 1966), citing and relying upon the holding of this Court in *Morgan* v. *United States*, 304 U.S. 1, 82 L.Ed. 1129 (1938). Similarly, learning of such claims after the hearing does not, and cannot, constitute "fair notice." *N.L.R.B.*, v. *Tennsco Corporation*, 339 F.2d 396 (6th Cir. 1964).

3. The question of what constitutes adequate notice and the related question of the role of the complaint, or comparable instrument, as establishing a standard of relevance which shall govern the subsequent hearing procedures, are matters which, in light of increasing resort to administrative adjudicative procedures, have implications

which go far beyond the immediate factual situation and should be weighed and passed upon by this Court.

Whether a hearing is required by statute or by reason of the due process clause of the Fifth Amendment, there exist the same fundamental requirements as to notice of, and opportunity to meet, whatever opposing contentions are involved. *Yang Sung* v. *McGrath*, 339 U.S. 33, 94 L.Ed. 616 (1950). In light of the "vast and varied administrative" tribunals "and the equally numerous and diversified interests affected by their functioning," the questions presented are of significant constitutional import and effect. *Federal Communications Commission* v. *Station WJR*, 377 U.S. 265, 93 L.Ed. 1353 (1949). The need for guidance from this Court, in the form of specific pronouncement upon the necessary relationship between the original contentions and ultimate findings, is further pointed up by the already accepted fact that the administrative bodies are not bound by strict rules as to admissibility of evidence which prevail in conventional judicial proceedings. The Court has recognized that "the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U.S. 88, 57 L.Ed. 431 (1913). More specifically the assertions must be and remain such that the "parties[will] be fully apprised of the evidence submitted *or to be considered*," in arriving at the ultimate findings or conclusions. *(Ibid.)* (emphasis added). The Court has passed upon the propriety of altering or amending the initial assertions at the outset of a hearing, while the hearing is in progress, and even at its conclusion when no material change was intended. *Consolidated Edison Company* v. *N.L.R.B.*, 305 U.S. 197, 83 L.Ed. 126 (1938); *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333,

82 L.Ed. 1381. But these cases left open the important question of whether, and to what extent, the complaint shall set a standard of relevance which will govern the nature and extent of the findings ultimately made. This is particularly significant in the context of National Labor Relations Board proceedings because Congress did not undertake to enumerate specific acts or conduct which shall constitute an unfair labor practice. Rather, it delegated to the Board "the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 798, 89 L.Ed. 1372 (1945). It is the very fact of these "infinite combinations" which makes it essential that the Board, which on the basis of its preliminary investigation of charges is in a position to know and say, be required to adhere to the contentions raised before and during the hearing, and not enjoy the element of surprise which results from advancement of a dissimilar contention in its post hearing brief. Such an advantage is not tolerated in conventional judicial proceedings and, though not such a proceeding in the strict sense, the administrative hearing required by due process is in the "tradition of judicial proceedings." *Morgan* v. *United States*, 298 U.S. 468, 480, 80 L.Ed. 1288, 1294 (1936); *Shields* v. *Utah Idaho Central Railroad Company*, 305 U.S. 177, 83 L.Ed. 111 (1938). And "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." This includes the right to know the specific charges into which inquiry is to be made. *Hannah* v. *Larche*, 363 U.S. 420, 4 L.Ed. 2d 1307 (1960). In the absence of an appropriate amendment of those charges, reliance upon matters beyond their scope

is viewed as an infringement upon procedural rights. *Vitarelli* v. *Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012 (1959).

4. The decision below conflicts in principle with the decisions of this Court in *Florida* v. *United States*, 282 U.S. 194, 75 L.Ed. 291 (1931); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 294 U.S. 499, 79 L.Ed. 1023 (1935); *N.L.R.B.* v. *Virginia Electric & Power Company*, 314 U.S. 469, 86 L.Ed. 348 (1941); *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 85 L.Ed. 1271 (1941); *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 91 L.Ed. 1995 (1947); *Federal Power Commission* v. *United Gas Pipe Line Company*, 393 U.S. 71, 21 L.Ed. 2d 55 (1968). These cases establish and reaffirm the rule that the basis for administrative action must be set forth with sufficient clarity to enable a reviewing court to determine if the agency has acted within the scope of the authority entrusted to it. This includes an adequate explication of the theory underlying agency action, an expression of its reasons "with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order." *Securities and Exchange Commission* v. *Chenery Corp.*, *supra*. A finding (such as the finding of discrimination in this case) based upon a theory which is at variance with that announced in the complaint, without explanation of the reasons for such variance, contravenes this long established principle. In contrast, the Board gave due consideration to this principle when it provided an explanation for not disposing of the contention as to reinstatement in the other (Hodge) case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

O. R. T. Bowden

Robert C. Langquist

Counsel for Petitioner

APPENDIX A

[Caption Omitted]

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

THIS CAUSE came on to be heard upon the petition of Great Dane Trailers, Inc., for review of an order issued against it by the National Labor Relations Board on October 21, 1970, in proceedings before the said Board known upon its record as Case No. 10-CA-8095; upon the cross application for enforcement, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition of Great Dane Trailers, Inc., be, and it is hereby denied; and that the said order of the National Labor Relations Board be, and it is hereby, enforced; and that Great Dane Trailers, Inc., abide by and perform the directions of the Board in said order contained.

_____

Clerk

FILED
SEP 21 1971
SAMUEL W. PHILLIPS
CLERK

APPENDIX A

[Caption Omitted]

(Argued August 27, 1971 Decided September 9, 1971.)

BEFORE SOBELOFF, SENIOR CIRCUIT JUDGE, AND WINTER AND RUSSELL, CIRCUIT JUDGES.

Robert C. Lanquist (Hamilton and Bowden on brief) for Petitioner, and Frank Vogel, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Elliott Moore, Attorney, National Labor Relations Board, on brief) for Respondent. (Robert L. Mitchell on brief) For Invervenor.

PER CURIAM:

There was substantial evidence to support the Board's findings and its conclusion that §§ 8(a)(3) and (1) were violated. We find that none of the company's procedural due process rights were violated in the conduct of the proceedings. The company's motion that the proceedings should be reopened for the receipt of after acquired evidence is lacking in merit.

ENFORCEMENT GRANTED.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD.

The relevant provisions of the National Labor Relations Act, as amended, (29 U.S.C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

* * *

The relevant portions of the Administrative Procedure Act (5 U.S.C. § 551, *et seq.*) are as follows:

Sec. 554. Persons entitled to notice of an agency hearing shall be timely informed of —

* * *

(3) the matters of fact and law asserted.

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No. 71-1033

In the Supreme Court of the United States

OCTOBER TERM, 1971

GREAT DANE TRAILERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
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Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioner Company was found by the Board to have violated Section 8(a) (3) and (1) of the National Labor Relations Act (Pet. App. 3a), having discharged employee Hodge, and refused to permit employee Vangiller to withdraw his resignation, because each man had engaged in union activities (A. 13-14, 25-29).[1] The court of appeals sustained the Board's findings and enforced its order (Pet. App. 2a). The sole question presented in the petition is whether the Company had adequate notice of, and opportunity to be heard on, the charge with respect

[1] "A." refers to the appendix to the briefs in the court of appeals.

to Vangiller. The facts relevant to this issue are as follows:

1. The complaint issued by the Board's General Counsel alleged that the Company had "discharged" Vangiller because of his union activities (A. 3–4). However, the proof adduced at the hearing before the Trial Examiner showed that Vangiller had in fact resigned, and, shortly thereafter, had sought unsuccessfully to rescind that resignation. The Trial Examiner, whose finding was sustained by the Board (A. 51–53), found that the Company refused to rescind Vangiller's resignation because of his union activities (A. 25–29).[2]

In these circumstances, the Company was not prejudiced by the fact that the complaint characterized the discrimination against Vangiller as a "discharge" rather than as an "unrescinded resignation." The general nature of Vangiller's termination was well known to the Company, and the only real issue was whether the termination—however described—was discriminatorily motivated. The General Counsel's proof at the hearing made out a *prima facie* case of such discrimination (n. 2, *supra*), and thus placed

[2] Thus, in mid-morning on Friday, November 14, 1968, Vangiller, upset over the broken promises of his supervisors that he would get time off on Saturday to accomplish some personal business, tendered his resignation. However, by mid-afternoon, Vangiller changed his mind and so advised his immediate supervisor, Assistant Superintendent English. English told him that he would have to talk to the personnel office, but not before the shift ended. At that time, Vangiller went immediately to Personnel Manager Egede-Nissen, explained why he had given notice to quit, and requested permission to withdraw his resignation. Egede-Nissen refused to accept the withdrawal because "the union might * * * have a kick if they came in." (A. 20–21, 26–29, 85.)

the Company on ample notice of the nature of the charges against it. The Company failed to sustain its burden of overcoming the General Counsel's proof.

2. *National Labor Relations Board* v. *Johnson*, 322 F. 2d 216 (C.A. 6), certiorari denied, 376 U.S. 951 (Pet. 5–6), on which petitioner places principal reliance, is distinguishable. The complaint there alleged an unlawful refusal to reemploy economic strikers, a claim which is substantially different from the one that the Board sought to add in that case, *i.e.*, whether the strikers were unlawfully discharged. Moreover, there, unlike here, "the discriminatory discharge was an issue unrecognized by the respondent and not one that should have been readily perceived from the progress of the proceedings" (322 F. 2d at 220).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1972.

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